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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE, APPELLANT

v.

RAYMOND BELCHER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (App. 8–14) is reported at 317 F. Supp. 1294.

JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Belcher was entered on September 14, 1970 (App. 14–15). Notice of appeal was filed on October 13, 1970 (App. 16) and probable jurisdiction was noted on March 1, 1971 (App. 19). The jurisdiction of this

Court is conferred by 28 U.S.C. 1252. *Flemming* v. *Rhodes,* 331 U.S. 100; *Flemming* v. *Nestor,* 363 U.S. 603, 604–08.

QUESTION PRESENTED

Whether the provision in the Social Security Act requiring the reduction of social security disability benefits because of the simultaneous receipt of state workmen's compensation benefits is unconstitutional.

STATUTES AND REGULATIONS INVOLVED

Section 424a of Title 42, United States Code (Supp. V) and the relevant Department of Health, Education and Welfare regulations are set forth in the Appendix to this Brief, *infra,* pp. 21–38.

STATEMENT

Section 224 of the Social Security Act, 42 U.S.C. (Supp. V) 424a, provides for certain reductions in social security benefits where the recipient also receives workmen's compensation benefits. Appellee Raymond Belcher, a resident of West Virginia, was awarded monthly social security disability insurance benefits beginning in October 1968 of $329.70 per month[1] (App. 34, 38). In January 1969 the Social Security Administration of the Department of Health, Education and Welfare notified Belcher that $104.40 would be withheld from his monthly social security benefits because he was receiving $47.00 a week, or $203.60 a month, in state workmen's compensation, thereby reducing his monthly federal payments to

[1] This total included $156.00 for himself and $57.90 each for his wife and two children.

$225.30 (App. 26, 32, 35, 38). Upon reconsideration, the Social Security Administration determined that the initial reduction of Belcher's social security benefits was correct (App. 33–35).[2]

After a hearing (App. 19–30) the hearing examiner, upon *de novo* consideration of the case, upheld the reduction of Belcher's social security benefits, pursuant to Section 224 of the Social Security Act, because of his receipt of state workmen's compensation (App. 36–42). Belcher sought review of the hearing examiner's decision (App. 42–43) but, after consideration of the entire record, the Appeals Council denied review and the hearing examiner's decision became the final decision of the Secretary (App. 43–44).

Thereafter, Belcher brought this action in the district court under 42 U.S.C. 405(g), seeking review of the final administrative determination (App. 2–5). Belcher alleged that Section 224 is unconstitutional because: (1) it discriminates irrationally between recipients of workmen's compensation benefits, whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs, whose social security benefits are not reduced; and (2) it deprives him and his family of property, in the form of social security benefits for which he has at least partially paid through social security taxes,

[2] Belcher was represented by an attorney throughout the administrative proceedings, as well as before the district court.

without due process of law (App. 3–5).[3] Acting on the parties' motions for summary judgment (App. 7), the district court held that Section 224 unconstitutionally discriminates against Belcher by requiring the reduction of his social security benefits and that it deprives him of property without due process of law (App. 8–14).

SUMMARY OF ARGUMENT

I. Section 224(a) of the Social Security Act provides for a reduction of social security benefits for recipients of workmen's compensation benefits. With the exception of the district court in this case, every court which has considered the constitutionality of Section 224(a) has upheld the statute.

Here the district court held that Section 224 improperly distinguishes between recipients of workmen's compensation benefits and recipients of awards such as private insurance proceeds and tort recoveries.

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[3] Belcher also alleged that Section 224 is unconstitutional because it arbitrarily requires the reduction of his social security benefits without taking account of attorney's fees paid by him in connection with his workmen's compensation claim. The district court did not rule on this allegation. At the administrative hearing, however, Belcher testified that he was not at that time paying any attorney's fee out of the workmen's compensation benefits he had been receiving (App. 27). Moreover, the Secretary will take into account the payment of such expenses, if they are identifiable, in computing the reduction. See 20 C.F.R. 404.408(d) reproduced in the Appendix to this Brief, *infra*, p. 32.

But, as this Court held in *Dandridge* v. *Williams,* 397 U.S. 471, a statutory classification in the area of social welfare is valid if it has a "reasonable basis." The legislative history of Section 224 demonstrates that the reduction requirement contained in that statute was reasonably designed to accomplish at least two goals—to rehabilitate the disabled worker and encourage him to return to productive work as soon as possible by avoiding the award of duplicating benefits, and to prevent the erosion or repeal of state workmen's compensation systems. Though arguably Congress might have gone further in promoting its goal of rehabilitation by also requiring reduction for receipt of benefits from private sources, this Court has frequently held that legislative reform is not invalid merely because it does not go far enough. *E.g., Williamson* v. *Lee Optical Company,* 348 U.S. 483.

II. In holding that Section 224 unconstitutionally deprives appellant of a property right without due process of law, the district court misapplied *Goldberg* v. *Kelly,* 397 U.S. 254. *Goldberg* held that welfare benefits of an individual cannot be terminated without an evidentiary hearing. Even if *Goldberg* were applicable to the disability benefits in question here, that case dealt only with the procedural rights of a person whose benefits are terminated because of alleged failure to meet statutory qualification. *Goldberg* has no bearing upon the substantive validity of a rational statutory limitation such as the qualification contained in Section 224.

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ARGUMENT

I

THE REDUCTION IN SOCIAL SECURITY BENEFITS TO REFLECT WORKMEN'S COMPENSATION PAYMENTS REQUIRED BY SECTION 224 HAS A REASONABLE BASIS

Section 224(a) of the Social Security Act provides that for any month in which an individual under age 62 is entitled to both social security benefits and periodic workmen's compensation benefits under any federal or state law, such individual's social security benefits shall be reduced by the amount by which the total benefits received under the social security and workmen's compensation programs for that month exceeds the higher of: (a) 80 percent of the individual's "average current earnings"[4] or (b) the total of certain other designated disability benefits. The con-

[4] An individual's "average current earnings" is defined as the larger of the average monthly wage used for purposes of computing his benefits under 42 U.S.C. 423 or one-sixtieth of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Pub. L. 90–248, Title I, Sec. 159(a), 81 Stat. 869) changed this clause to provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings," then his actual earnings, rather than those earnings creditable for purposes of social security (which have an upper limit), are to be used.

Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic workmen's compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

stitutionality of Section 224(a) has been litigated in numerous federal courts, all of which have upheld the statute.[5]

Here the district court held that Section 224 improperly distinguishes between recipients of workmen's compensation benefits, whose social security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries

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[5] In addition to *Bartley* v. *Finch*, 311 F. Supp. 876 (E.D. Ky.), presently on appeal to this Court, *Bartley* v. *Richardson*, No. 703, October Term, 1970, the constitutionality of Section 224 has been upheld in the following cases: *Nieves* v. *Secretary of HEW*, 1 CCH Unemployment Ins. Rptr., Fed. Matter No. 15,479 (Puerto Rico); *Gambill* v. *Finch*, 309 F. Supp. 1 (E.D. Tenn.); *Lofty* v. *Cohen* (E.D. Mich. Civ. No. 30916, decided March 25, 1970), affirmed, *Lofty* v. *Richardson* (C.A. 6, No. 20484, decided March 4, 1971); *Bailey* v. *Finch*, 312 F. Supp. 918 (N.D. Miss.); *Benjamin* v. *Finch* (E.D. Mich., Civ. No. 32816, decided May 26, 1970, pending before the Sixth Circuit, No. 20714); *Miley* v. *Finch* (E.D. Mich., Civ. No. 33560, decided June 12, 1970); *Gooch* v. *Finch* (S.D. Ohio, Civ. No. 6840, decided July 13, 1970; and *Rodatz* v. *Finch* (E.D. Ill., Civ. No. 69–170, decided September 8, 1970, pending before the Seventh Circuit, No. 18,954).

The following cases involving challenges to the constitutionality of Section 224 are pending: *Sheets* v. *Finch* (S.D. W. Va., Civ. No. BK 69–3); *Richards* v. *Richardson* (S.D. W. Va., Civ. No. 70–168–CH); *Cline* v. *Richardson* (S.D. W. Va., Civ. No. 1241), and *Walker* v. *Richardson* (S.D. W. Va., Civ No. 1243) (stayed pending decision in this Court in the instant case); *Gillenwater* v. *Richardson* (S.D. W. Va., Civ. No. 69–140–CH); *Copeland* v. *Finch* (W.D. Okla., Civ. No. 69–363); *Wren* v. *Finch* (W.D. Mich., Civ. No. 6171); *McAlonan* v. *Finch* (W.D. Mich., Civ. No. 6269); *Schuster* v. *Richardson* (W.D. Mich., Civ. No. 6381); *Haynes* v. *Richardson* (E.D. Mich., Civ. No. 35205); *Debkowski* v. *Richardson* (E.D. Pa., Civ. No. 70–2895); *Gross* v. *Richardson* (E.D. Ark., Civ. No. PB 70–C–132); and *Cantu* v. *Richardson* (N.D. Tex., Civ. No. CA 34187 B).

and successful tort plaintiffs, whose social security benefits are not reduced (App. 13–14). But under the rationale of *Dandridge* v. *Williams*, 397 U.S. 471, this distinction is valid. There this Court stated (p. 485):

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69–70. "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

See also, *McDonald* v. *Board of Election*, 394 U.S. 802, 809.

Although the alleged statutory discrimination challenged here is federal, these principles are equally applicable in determining whether a statutory classification violates the Due Process Clause of the Fifth Amendment. *Flemming* v. *Nestor*, 363 U.S. 603, 611; *Gruenwald* v. *Gardner*, 390 F. 2d 591, 592 (C.A. 2), certiorari denied, 393 U.S. 982. Of course, the "reasonable basis" test of equal protection and due process, rather than the more strict "compelling [state]

interest" test (see *Shapiro* v. *Thompson,* 394 U.S. 618, 634; *Carrington* v. *Rash,* 380 U.S. 89), is applicable to the instant case. For here, as in *Dandridge, supra,* we are not dealing with "freedoms guaranteed by the Bill of Rights" (397 U.S. at 484), but rather with benefits provided by statute. Thus, Section 224 is valid if there is a reasonable basis for requiring a reduction for workmen's compensation beneficiaries.

The legislative history of Section 224 demonstrates that there is a reasonable basis for the reduction requirement. The offset of workmen's compensation benefits against social security disability benefits was first suggested by the Advisory Council on Social Security in a 1948 report to the Senate Finance Committee proposing a system of social security disability benefits. The Advisory Council recommended that such benefits be suspended for any period for which workmen's compensation cash benefits are payable under any state or federal program because, "[i]f combined payments become a major fraction of prior earnings, the economic incentive for beneficiaries to return to work may be insufficient" (S. Doc. No. 162, 80th Cong., 2d Sess., p. 8).

A bill was introduced at that time to amend the Social Security Act to include temporary and permanent disability insurance benefits.[6] But provisions for

[6] In hearings on this bill before the Committee on Ways and Means of the House of Representatives, the following exchange concerning the bill's reduction requirement took place between Congressman Wilbur Mills and the then Commissioner of Social Security, Dr. Arthur Altmeyer:

"Mr. Mills. Workmen's compensation has been established as a substitute for common-law actions against employers. If you

disability insurance benefits were not added to the Social Security Act until the Social Security Amendments of 1956. Included in those amendments was the predecessor to Section 224, which would have required the full offset of workmen's compensation benefits against monthly disability insurance benefits.[7]

In 1958 the House Committee on Ways and Means recommended, and the Congress enacted, the repeal

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refuse [social security] cash sickness [benefits] in this type of case, it would be consistent to do the same thing when there is a common-law right against anybody—for example, a personal injury suit against a railroad—would it not? What I mean is this: the loss of wages is part of the damage always sought to be recovered and is included in the judgment when a judgment is rendered. Now, can you explain to the committee why the cash sickness benefits should be paid in the one case and denied in the other case?

"Dr. ALTMEYER. In the case of workmen's compensation, the average State law has specific provisions with regard to eligibility for the benefits and as regards the amount of the benefits. It would have an adverse effect upon workmen's compensation laws if the benefits were paid under a Federal law for an injury sustained in the course of one's employment that is compensable under a State workmen's compensation law. The tendency, of course, would be for the States to push more and more of the burden of workmen's compensation onto the sickness disability system. That is the reason."

(Hearings on H.R. 2893 Before the House Committee on Ways and Means, 81st Cong., 1st Sess., pt. 2, pp. 1270–1271. See also, *id.*, at pp. 1558–1559 (testimony of Professor Sumner H. Slichter).)

[7] See 70 Stat. 816–817; H. Rep. No. 1189, 84th Cong., 1st Sess., p. 6; H. Rep. No. 2936 (Conf. Rep.), 84th Cong., 2d Sess., p. 25. This section was upheld, without question as to its constitutionality, against attack by recipients of lump sum workmen's compensation settlements granted under the laws of Massachusetts and Illinois, respectively, in *Walters* v. *Flemming*, 185 F. Supp. 288 (D. Mass.), and *Knapczyk* v. *Ribicoff*, 201 F. Supp. 283 (N.D. Ill.).

of Section 224.[8] At the time of and subsequent to such repeal, numerous obections were made to the elimination of the offset provision. Most of them rested on the theory that to permit the payment of double disability benefits approaching or even exceeding earnings prior to the onset of the disability would defeat the basic purpose of the disability insurance program—to rehabilitate beneficiaries whenever possible and to encourage their return to productive work—and would weaken state workmen's compensation programs.[9]

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[8] Section 224 was repealed because it was believed that the duplication of disability benefits occurred so infrequently as not to warrant the undesirable results produced in individual cases by the offset provision (H. Rep. No. 2288, 85th Cong., 2d Sess., pp. 5, 13; S. Rep. No. 2388, 85th Cong., 2d Sess., pp. 4–5, 11; Pub. L. 85–840, Title II, Sec. 206, 72 Stat. 1025).

[9] See the following testimony: Hearings on H.R. 13549 Before the Senate Committee on Finance, 85th Cong., 2d Sess., pp. 241–242 (G. T. Fonda, Nat. Asso. of Mfrs.); 297 (letter of Greater Boston Chamber of Commerce); 319, 342–343, 346–347 (A. D. Marshall, U.S. Chamber of Commerce); 390 (E. R. Bartley, Ill. Mfrs. Asso.); and 398–400 (J. J. Maher, Commerce & Industry Asso. of New York); Executive Hearings on H.R. 1 Before the House Committee on Ways and Means, 89th Cong., 1st Sess., pp. 30–32; and Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., pp. 130–131, 146–153, 219–222 (A. J. Celebrezze, Secretary of HEW, W. J. Cohen, Asst. Secretary of HEW, and R. M. Ball, Commissioner of Social Security); *id.*, pp. 249–253 (K. T. Schlotterbeck, U.S. Chamber of Commerce); 258–260 (L. J. Dikovics, Council of State Chambers of Commerce); 363–367, 370–373 (M. Z. Eubank, Commerce & Industry Asso. of New York); 422 (R. E. King, Jr., Nat. Asso. of Life Underwriters); 543 (M. Eddy, Am. Life Convention and Life Insurers Conf.); 818–819 (P. D. Hill, Int'l. Asso. of Health Underwriters); 892–903 (J. D. Dorsett, Am. Insurance Asso.); 949–954 (J. A. Flynn, New York Shipping Asso.); 987, 990 (J. A. Mann,

In 1965 Congress gave further consideration to the offset of workmen's compensation benefits against disability insurance benefits. The House took no ac-

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Ill. State Chamber of Commerce) and 1030–1033 (W. A. Callahan, Int'l. Asso. of Industrial Accident Boards and Commissions). In 1965 L. J. Dikovics, representing the Council of State Chambers of Commerce, told a subcommittee of the Senate Committee on Finance that:

> Thousands of disabled workers today are receiving more tax-free income from social security disability benefits combined with State workmen's compensation benefits than they were earning before they became ill or were injured. * * * When tax-free social insurance benefits exceed earning power there is little incentive for a disabled person to accept the risk, pain, and struggle involved in attempting to become self-supporting again.
>
> A matter of equal concern is the impact of Federal disability payments on State workmen's compensation programs. Legislative proposals have been offered in several States (Colorado, Florida, Maryland, and Minnesota) to reduce workmen's compensation benefits by the amount of OASI disability benefits payable to a disabled worker. If other States follow this direction and section 303 of this bill is enacted, we believe it will be only a matter of time until State workmen's compensation programs are destroyed.
>
> If that happens, a major impetus for this country's remarkable achievements in occupational safety will be destroyed also. Workmen's compensation insurance costs are based on the actual loss experience of industry groups and of individual employers. This gives the employer a direct financial incentive to improve safety on the job. If workmen's compensation costs are absorbed into the social security program, employers without safety programs and those whose employment is hazardous would pay no more than those employers who have adopted safety programs or who have less hazardous employment. We strenuously object to any action which could have an adverse effect on safety programs and on the remarkable downswing in

tion in the first instance,[10] but the Senate Committee on Finance, prompted by data indicating that in 35 of the 50 states, the average combined amounts of social security benefits and workmen's compensation payments to a worker with a wife and two children *exceeded* the worker's take home pay while working (Hearings on H.R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., p. 151; see also, *id.*, pp. 892–923), determined that immediate action was necessary.[11] In its report recommending the present version of Section 224, the Committee stated:

> Although there is some dispute as to the number of workers who receive benefits under these two programs and whether these payments are excessive, the committee believes that it is desirable as a matter of sound principle to prevent the payment of excessive combined benefits.[12]

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disabling accidents that has taken place over the last three decades.

* * * * *

Hearings on H. R. 6675 Before the Senate Committee on Finance, 89th Cong., 1st Sess., p. 259 (1965).

[10] The Committee on Ways and Means, while noting the expressions of concern over the payment of double benefits, determined to await the additional information on the overlap and its effects which it had requested of the Advisory Council on Social Security (H. Rep. No. 213, 89th Cong., 1st Sess., p. 90).

[11] Persons testifying in favor of immediate legislative action are listed in note 9, *supra*. The Secretary of Health, Education and Welfare opposed any legislatiye action until a more thorough study could be made. *Id.*, pp. 130–131, 146.

[12] The report continued:

> The committee believes that the provision it is recommending avoids the problems and inequities of the earlier offset provision in the social security law for reducing

The present version of Section 224 was adopted in conference (H. Rep. No. 682, 89th Cong., 1st Sess., pp. 63–64) and was added to the law as part of the Social Security Amendments of 1965, effective January 1, 1966 (Pub. L. 89–97, Title III, Sec. 335, 79 Stat. 406).

This legislative history reveals that Congress wanted to preserve the basic purpose underlying the social security disability insurance system—that of

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monthly disability benefits by the amount of any other benefit to which a worker was entitled under State workmen's compensation laws, which was in effect from July 1957 to July 1958, but was repealed then. The new offset provision recommended by the committee provides for a reduction in the social security disability benefit (except where the State workmen's compensation law provides for an offset against social security disability benefits) in the event the total benefits paid under the two programs exceed 80 percent of the worker's average monthly earnings prior to the onset of disability. Under this provision, the worker's average monthly earnings would be defined as the higher of (a) his average monthly wage used for purposes of computing his social security disability benefit or (b) his average monthly earnings, in employment covered by social security, during his highest 5 consecutive years after 1950. (In no event, however, would the total benefits payable with respect to a worker be reduced below the amount of the unreduced monthly social security benefits). This reduction formula would generally avoid the inequity encountered under the previous offset provision, where the reductions that were required frequently resulted in benefits that replaced no more than 30 percent or so of the worker's earnings at disablement.

* * * * *

S. Rep. No. 404, 89th Cong., 1st Sess., p. 100. See also *id.*, pp. 260–264.

rehabilitating the disabled worker and encouraging him to return to productive work as soon as he can—and that it feared the payment of excessive disability benefits would defeat that purpose. In addition, Congress wanted to prevent the erosion or repeal of state workmen's compensation systems, which it felt would eventually occur should the federal disability system duplicate the state systems. These congressional purposes provide a reasonable basis for the reduction requirement. Furthermore, the manner by which the reduction is carried out under Section 224 (as explained by the Senate Committee on Finance, *supra*, note 12) is reasonable. Section 224, then, satisfies the requirements of due process and equal protection.[13]

This conclusion is not undermined by the fact that the reduction is not made for private disability insurance beneficiaries or for successful tort plaintiffs. In order to achieve its purpose of avoiding excessive disability benefits, Congress might well have gone further and applied the reduction provision of Section 224 to those who receive compensation from private sources as well as to beneficiaries of workmen's compensation statutes. But, as this Court has frequently held, legislative reform is not invalid merely because it does not go far enough. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

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[13] In the only court of appeals decision on the issue to date, the constitutionality of Section 224 was upheld against an attack on equal protection grounds. *Lofty* v. *Richardson* (C.A. 6, No. 20484, decided March 4, 1971).

Williamson v. *Lee Optical Co.*, 348 U.S. 483, 489. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 657.[14]

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[14] There is evidence that Congress, from the beginning of the social security disability insurance program, has tried not to discourage disability beneficiaries from procuring additional protection through private means, such as private insurance. See, *e.g.*, recommendation 2 of the Advisory Council on Social Security submitted to Congress in 1938 (Hearings on Social Security Amendments of 1939 Before the House Committee on Ways and Means, 76th Cong., 1st Sess., vol. 1, p. 37) and its explanation by Dr. Arthur Altmeyer, the Chairman of the Social Security Board (*id.*, vol. 3, p. 2286).

Moreover, in *Lofty* v. *Richardson*, *supra*, note 13, the Sixth Circuit suggested several additional reasons for requiring the reduction only for receipt of workmen's compensation benefits (slip opinion, pp. 12–13):

> The legislative history of this amendment shows a great many complaints were registered before Congress about Workmen's Compensation-Social Security double coverage. The record is devoid of any complaints at all about double coverage resulting from private insurance or negligence actions in courts. It is neither novel nor necessarily irrational for Congress to fail to act upon a problem about which they have received no complaints and have been supplied no information, even when Congress, as here, does act upon a somewhat parallel problem as to which it had both.
>
> Still another reason which might reasonably be conceived to justify the congressional classification is that administratively it would be relatively simple to enforce the Workmen's Compensation deductions, whereas separating out the wage benefits from civil damage judgments, or determining who had received private insurance benefits, might offer administrative problems of a serious nature.
>
> Finally, it is entirely conceivable to us that Congress may have considered Social Security benefits and Workmen's Compensation benefits to be more arguably duplicative of one another than could appropriately be claimed concerning Social Security benefits and the other two types of payments. Both Social Security and Workmen's Com-

We add only that the equal protection ground relied upon by the court below in invalidating the statute—that receipt of West Virginia workmen's compensation benefits, because they are private in nature, cannot constitutionally support the reduction of simultaneously received social security disability benefits—is unwarranted. Our argument in support of Section 224 in no way depends upon whether state workmen's compensation benefits are derived from public or private sources. Instead, our argument is that in effectuating the purposes of the social security disability system—namely, rehabilitating the disabled worker and encouraging him to return to productive work as soon as he is able, and preventing the erosion or repeal of state workmen's compensation systems—Congress rationally chose to reduce the social security payments to recipients of such duplicating benefits. Thus, even if the court's characterization of West Virginia workmen's compensation benefits as private in nature is correct—which is highly questionable [15]—that characterization does not render invalid the reduction of social security payments paid to state workmen's compensation beneficiaries.

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pensation programs are social welfare legislation. Private accident or disability insurance is a private contract, frequently paid for entirely by the recipient. And, of course, court awards for injuries are private rights derived from the common law involving the principle of compensation for negligence or fault.

[15] As in all other jurisdictions, both state and federal, the workmen's compensation system in West Virginia exists solely by virtue of state legislation (W. Va. Code, Chap. 23 (1966 ed.). Moreover, the West Virginia system is administered by

II

THE REDUCTION IN BENEFITS REQUIRED BY SECTION 224 DOES NOT DEPRIVE APPELLEE OF A PROPERTY RIGHT IN VIOLATION OF THE DUE PROCESS CLAUSE

The district court also held Section 224 unconstitutional on the ground that the statute deprives Belcher of a property right—his disability benefits—without due process of law. In support of this holding the court cited *Goldberg* v. *Kelly,* 397 U.S. 254, which held that the welfare benefits of an individual recipient cannot be terminated without an evidentiary hearing (*id.* at 260–261). According to the court below, the reasoning of *Goldberg*—which it construed as imbuing welfare benefits with a property-right status—applies equally to social security disability benefits and, consequently, Section 224 cannot constitutionally reduce Belcher's right to receive social security disability benefits (App. 9–12).

Even if *Goldberg* were extended to apply to the social security disability benefits in question here, however, the conclusion reached by the district court would not follow. In *Flemming* v. *Nestor,* 363 U.S. 603, this Court sustained the statutory termination of the social security old-age benefits of an alien deported

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a state commissioner (W. Va. Code, § 23–1–1) and operates solely because of the sanctions imposed by state law. Thus, while private employers may elect not to participate in the system (W. Va. Code, § 23–2–6), employers so deciding must provide their own method of compensation, which must be approved by the commissioner, and post sufficient bond to insure payment of compensation and expenses to their injured employees (W. Va. Code, § 23–2–9; see also, *id.*, § 23–2–8).

because of his membership in the Communist party, adding that an individual who has become eligible to receive benefits under the Social Security Act does not have an indefeasible property right to those benefits. The court below determined that *Goldberg* had implicitly overruled *Nestor* and required the invalidation of Section 224. But *Goldberg* dealt only with the procedural rights of a person whose benefits are terminated because of alleged failure to meet statutory qualifications; it has no bearing whatsoever upon the substantive validity of rational statutory limitations such as the qualification in Section 224 held invalid by the court below. As this Court observed in *Dandridge* v. *Williams, supra* (397 U.S. at 487):

> The Constitution may impose certain procedural safeguards upon systems of welfare administration, *Goldberg* v. *Kelly* * * *. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. * * *

Thus, under *Nestor,* as under *Dandridge* v. *Williams, supra,* Congress could constitutionally reduce the social security benefits awarded to appellee and his family so long as that reduction was not based upon a patently arbitrary classification (363 U.S. at 611).

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
L. PATRICK GRAY, III,
Assistant Attorney General.
RICHARD B. STONE,
Assistant to the Solicitor General.
KATHRYN H. BALDWIN,
JAMES C. HAIR, JR.,
Attorneys.

APRIL 1971.

APPENDIX

42 U.S.C. 424a provides:

§ 424a. REDUCTION OF DISABILITY BENEFITS THROUGH RECEIPT OF WORKMEN'S COMPENSATION.

(a) If for any month prior to the month in which an individual attains the age of 62—

(1) such individual is entitled to benefits under section 423 of this title, and

(2) such individual is entitled for such month, under a workmen's compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent), and the Secretary has, in a prior month, received notice of such entitlement for such month,

the total of his benefits under section 423 of this title for such month and of any benefits under section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of—

(3) such total of benefits under sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan, exceeds the higher of—

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under section 423 of this title for such month and of any

monthly insurance benefits under section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section.

In no case shall the reduction in the total of such benefits under sections 423 and 402 of this title for a month (in a continuous period of months) reduce such total below the sum of—

(7) the total of the benefits under sections 423 and 402 of this title, after reduction under this section, with respect to all persons entitled to benefits on the basis of such individual's wages and self-employment income for such month which were determined for such individual and such persons for the first month for which reduction under this section was made (or which would have been so determined if all of them had been so entitled in such first month), and

(8) any increase in such benefits with respect to such individual and such persons, before reduction under this section, which is made effective for months after the first month for which reduction under this section is made.

For purposes of clause (5), an individual's average current earnings means the larger of (A) the average monthly wage used for purposes of computing his benefits under section 423 of this title, or (B) one-sixtieth of the total of his wages and self-employment income (computed without regard to the limitations specified in sections 409(a) and 411(b)(1) of this title) for the five consecutive calendar years after 1950 for which such wages and self-employment income were highest. In any case where an individual's wages and self-employment income reported to the Secretary for a calendar year reach the limitations specified in sections 409(a) and 411(b)(1) of this title, the Secretary under regulations shall estimate the total

of such wages and self-employment income for purposes of clause (B) of the preceding sentence on the basis of such information as may be available to him indicating the extent (if any) by which such wages and self-employment income exceed such limitations.

(b) If any periodic benefit under a workmen's compensation law or plan is payable on other than a monthly basis (excluding a benefit payable as a lump sum except to the extent that it is a commutation of, or a substitute for, periodic payments), the reduction under this section shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a) of this section.

(c) Reduction of benefits under this section shall be made after any reduction under subsection (a) of section 403 of this title but before deductions under such section and under section 422(b) of this title.

(d) The reduction of benefits required by this section shall not be made if the workmen's compensation law or plan under which a periodic benefit is payable provides for the reduction thereof when anyone is entitled to benefits under this subchapter on the basis of the wages and self-employment income of an individual entitled to benefits under section 423 of this title.

(e) If it appears to the Secretary that an individual may be eligible for periodic benefits under a workmen's compensation law or plan which would give rise to reduction under this section, he may require, as a condition of certification for payment of any benefits under section 423 of this title to any individual for any month and of any benefits under section 402 of this title for such month based on such individual's wages and self-employment income, that such individual certify (i) whether he has

filed or intends to file any claim for such periodic benefits, and (ii) if he has so filed, whether there has been a decision on such claim. The Secretary may, in the absence of evidence to the contrary, rely upon such a certification by such individual that he has not filed and does not intend to file such a claim or that he has so filed and no final decision thereon has been made, in certifying benefits for payment pursuant to section 405(i) of this title.

(f)(1) In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 423 of this title and any benefits under section 402 of this title based or his wages and self-employment income was first required (in a continuous period of months), and in each third year thereafter, the Secretary shall redetermine the amount of such benefits which are still subject to reduction under this section; but such redetermination shall not result in any decrease in the total amount of benefits payable under this subchapter on the basis of such individual's wages and self-employment income. Such redetermined benefit shall be determined as of, and shall become effective with, the January following the year in which such redetermination was made.

(2) In making the redetermination required by paragraph (1) of this subsection, the individual's average current earnings (as defined in subsection (a) of this section) shall be deemed to be the product of his average current earnings as initially determined under subsection (a) of this section and the ratio of (i) the average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to (ii) the average of the taxable wages

of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 shall be reduced to the next lower multiple of $1.

(g) Whenever a reduction in the total of benefits for any month based on an individual's wages and self-employment income is made under this section, each benefit, except the disability insurance benefit, shall first be proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit shall then be applied to such disability insurance benefit.

Part 404.408 of 20 C.F.R. provides:

§ 404.408 REDUCTION OF BENEFITS BASED ON DISABILITY ON ACCOUNT OF RECEIPT OF WORKMEN'S COMPENSATION

(a) *When reduction required.* Under section 224 of the Act, a disability insurance benefit to which an individual is entitled under section 223 of the Act for a month after 1965 and before the individual attains age 62 (and any monthly benefit for the same month payable to others under section 202 of the Act on the basis of the same earnings record) is reduced (except as provided in paragraph (b) of this section) by an amount as determined under paragraph (c) of this section if:

(1) The individual entitled to the disability insurance benefit is also entitled under a workmen's compensation law or plan of the United States or a State to a periodic benefit for such

month for a total or partial disability (whether or not permanent) and

(2) The Secretary has, in a month before such month, received notice of such entitlement for such month, and

(3) The period of disability involved began after June 1, 1965.

(b) *When reduction not made.* The reduction of a benefit otherwise required by paragraph (a) of this section is not made if the workmen's compensation law or plan under which the periodic benefit is payable provides for the reduction of such periodic benefit when anyone is entitled to a benefit under title II of the Act on the basis of the earnings record of an individual entitled to a disability insurance benefit under section 223 of the Act.

(c) *Amount of reduction*—(1) *General.* The total of benefits payable for a month under sections 223 and 202 of the Act to which paragraph (a) of this section applies is reduced (but not below zero) by the amount by which the sum of such total of benefits and such periodic benefits payable (and actually paid) for such month to such individual under the workmen's compensation law or plan exceeds the higher of:

(i) Eighty percent of his "average current earnings," as defined in subparagraph (3) of this paragraph, or

(ii) the total of such individual's disability insurance benefit for such month and all other benefits payable for such month based on such individual's earnings record, prior to reduction under this section.

(2) *Limitation on reduction.* In no case may the total of monthly benefits payable for a month to the disabled worker and to the persons entitled to benefits for such month on his earnings record be less than:

(i) The total of the benefits payable (after reduction under paragraph (a) of this section) to such beneficiaries for the first month for which reduction under this section is made, and

(ii) Any increase in such benefits which is made effective for months after the first month for which reduction under this section is made.

(3) *Average current earnings defined*—(i) *In general.* An individual's "average current earnings" for purposes of this section means the larger of:

(*a*) The average monthly wage used for purposes of computing the individual's disability insurance benefit under section 223 of the Act, or

(b) One-sixtieth of the total of such individual's wages and earnings from self-employment without the limitations under sections 209(a) and 211(b)(1) of the Act for the 5 consecutive calendar years after 1950 for which such wages and earnings from self-employment were highest. The extent by which such individual's wages and earnings from self-employment exceed the limitations under sections 209(a) and 211(b)(1) of the Act for any calendar year after 1950 is computed in accordance with the provisions of subdivision (ii) of this subparagraph. Any amount so computed which is not a multiple of $1 is reduced to the next lower multiple of $1.

(ii) *Method of determining calendar year earnings in excess of the limitations under sections 209(a) and 211(b)(1) of the Act*—(*a*) *In general.* For the purposes of subdivision (i)(*b*) of this subparagraph, the extent by which the wages or earnings from self-employment of an individual exceed the maximum amount of earnings creditable under sections 209(a) and 211(b)(1) of the Act in any calendar year after 1950 will ordinarily be estimated on the basis of the earnings information avail-

able in the records of the Administration. (See Subpart I of this part.) If an individual adduces satisfactory evidence of his actual earnings in any year, the extent, if any, by which his earnings exceed the limitations under sections 209(a) and 211(b)(1) of the Act shall be determined by the use of such evidence instead of by the use of estimates.

(b) *Estimated wage earnings—(1) One employer involved.* In any calendar year after 1950 in which wages are reported for an individual, the wages credited to his earnings record for each calendar quarter before the quarter in which the maximum amount creditable under section 209(a) of the Act is attained are deemed to be the individual's actual earnings for each such quarter. The amount of wages for the calendar quarter in which the maximum amount of earnings was attained and for each succeeding calendar quarter of that year, if any, in which the individual worked is deemed to be equal to the largest amount credited to his earnings account in that calendar year for any calendar quarter through the quarter in which the maximum amount of earnings was attained.

Example. In the year 1966 in which $6,600 is the maximum creditable earnings amount under section 209(a) of the Act. W worked for the XYZ Company. His earnings record shows the following amounts of wages:

1st quarter	$2,400
2d quarter	2,550
3d quarter	1,650
4th quarter	0
Total	6,600

The maximum creditable earnings amount was reached in the third quarter. The amount of wages for that quarter and for the succeeding fourth quarter is deemed to equal the highest quarterly amount credited, i.e., the amount of $2,550 credited to the second quarter. Thus

W's total estimated wages for the year 1966 are determined as follows:

1st quarter	$2,400
2d quarter	2,550
3d quarter	2,550
4th quarter	2,550
Total	10,050

(2) *Two or more employers involved.* In any calendar year after 1950 in which wages are reported for an individual by more than one employer, if the total wages reported by any employer equal or exceed the maximum amount of earnings creditable under section 209(a) of the Act, the total wages from such employer for the quarters in which the individual worked for that employer are estimated in accordance with the provisions of (*1*) of this subdivision (ii) (*b*).

Example. In the calendar year 1964 in which $4,800 is the maximum amount of earnings creditable under section 209(a) of the Act, A worked for four employers. The following amounts are creditable to his earnings record:

	Employer No. 1	Employer No. 2	Employer No. 3	Employer No. 4	Total
1st quarter	$1,400	$1,200	$0	$0	
2d quarter	1,200	1,200	150	300	
3d quarter	2,200	1,200	0	1,800	
4th quarter	0	1,200	250	2,700	
	$4,800	$4,800	$400	$4,800	$14,800

Wages from Employer No. 1 reached the maximum in the third quarter. For this quarter and the succeeding fourth quarter, A's wages from Employer No. 1 are deemed to equal $2,200 in each of these two quarters. Wages from Employer No. 2 reached the maximum in the fourth quarter, but since all of the quarterly amounts credited are equal, there are no additional deemed wages. Since the total wages reported by Employer No. 3 never reached the

maximum, the actual amounts credited are deemed to be his total wages from such employer. Wages from Employer No. 4 reached the maximum in the fourth quarter. However, since this is the highest quarterly amount credited and there are no succeeding quarters, the total earnings from this employer are deemed to be the actual amounts credited. Thus, A's total wages for 1964 are estimated as follows:

	Employer No. 1	Employer No. 2	Employer No. 3	Employer No. 4	Total
1st quarter	$1,400	$1,200	$0	$0	
2d quarter	1,200	1,200	150	300	
3d quarter	2,200	1,200	0	1,800	
4th quarter	2,200	1,200	250	2,700	
	$7,000	$4,800	$400	$4,800	$17,000

(c) *Estimated, earnings from self-employment.* In any such calendar year in which self-employment income is credited to an individual's earnings record and such credit equals the maximum amount of earnings creditable under section 211(b)(1) of the Act, the amount of earnings from self-employment for such individual's taxable year is deemed to equal his total net earnings from self-employment as shown in his tax returns on file in the records of the Administration.

Example. In the calendar year 1957 in which $4,200 is the maximum amount creditable as self-employment income under section 211(b)(1) of the Act, C has maximum self-employment income of $4,200 credited to his earnings record. C's self-employment tax return for 1957 shows net earnings from self-employment of $8,300. Thus, C's earnings from self-employment are deemed to equal $8,300 for 1957.

(d) *Wages and self-employment income involved.* In any such calendar year, in which both wages and self-employment income are credited to an individual's earnings record, the amount of such individual's total earnings for such calendar year is deemed to equal the total

of his wages as determined under the provisions of (*b*) of this subdivision and the amount of his net earnings from self-employment as determined under the provisions of (*c*) of this subdivision.

Example. For the calendar year 1967 in which $6,600 is the maximum creditable earnings under sections 209(a) and 211(b)(1) of the Act, D who was both employed and self-employed has the following amounts credited to his earnings record:

	Wages	Self-employment income
1st quarter	$1,500	
2d quarter	1,500	
3d quarter	1,500	
4th quarter	1,500	
	$6,000	$600.

Since the amount of wages credited do not equal or exceed the maximum amount creditable under section 209(a) of the Act, D's total wages for the year are deemed to be $6,000. However, the amount of net earnings from self-employment shown on D's self-employment tax return is $2,300. D's earnings from self-employment are deemed to equal net earnings from self-employment which he reported for the year. Thus, D's earnings for 1967 are estimated as follows:

Wages	$6,000
Net earnings from self-employment	2,300
Total	8,300

(4) *Reentitlement to disability insurance benefits.* If an individual's entitlement to disability insurance benefits terminates and such individual again becomes entitled to disability insurance benefits, the amount of the reduction is again computed based on the figures specified in this paragraph (c) applicable to the subsequent entitlement.

(d) *Items not counted for reduction.* Amounts included in the workmen's compensation award which are specifically identifiable as being for medical, legal or related expenses paid or incurred by the individual in connection with his workmen's compensation claim, or the injury or occupational disease on which it is based, are excluded in computing the reduction under paragraph (a) of this section.

(e) *Certification by individual concerning eligibility for workmen's compensation payment.* Where it appears that an individual may be eligible for a periodic benefit under a workmen's compensation law or plan which would give rise to reduction under paragraph (a) of this section, the individual may be required, as a condition of certification for payment of any benefit under section 223 of the Act to any individual for any month, and of any benefit under section 202 of the Act for such month based on such individual's earnings record, to furnish evidence as requested by the Administration and to certify as to:

(1) Whether he has filed or intends to file any claim for such periodic benefit, and

(2) If he has so filed, whether there has been a decision on such claim. In the absence of evidence to the contrary, reliance may be placed upon a certification that he has not filed and does not intend to file such a claim, or that he has filed and no decision has been made, in certifying any benefit for payment pursuant to section 205(i) of the Act.

(f) *Workmen's compensation benefit payable on other than a monthly basis.* Where workmen's compensation benefits are paid periodically but not monthly, or in a lump sum as a commutation of or a substitute for periodic benefits, the reduction under this section is made at such time or times and in such amounts as the Administration determines will

approximate as nearly as practicable the reduction required under paragraph (a) of this section.

(g) *Priorities.* (1) For an explanation of when a reduction is made under this section where other reductions, deductions, etc., are involved, see § 404.402.

(2) Whenever a reduction in the total of benefits for any month based on an individual's earnings record is made under paragraph (a) of this section, each benefit, except the disability insurance benefit, is first proportionately decreased, and any excess of such reduction over the sum of all such benefits other than the disability insurance benefit is then applied to such disability insurance benefit.

Example: Under title II of the Act, A is entitled to a monthly disability insurance benefit of $122. His wife, B, and his two children, C and D, are entitled to monthly insurance benefits of $61 each. After adjustment for the family maximum under section 203(a) of the Act, the benefits are $122 for A and $50.60 for B, C, and D making a total of title II benefits of $273.80. In computing A's "average current earnings," it is determined that A's average monthly wage used in computing his benefit rate is $340, and his average monthly wage for his 5 years of highest earnings after 1950 is $400. Therefore, 80 percent of his "average current earnings" for purposess of the workmen's compensation deduction is $320.

A becomes entitled to workmen's compensation of $48 a week, which converted to a monthly rate amount to $208 a month (i.e., 4⅓ times $48). The total monthly benefits payable under title II of the Act ($273.80) plus the monthly workmen's compensation amount ($208) equals $481.80. The amount of the reduction for workmen's compensation is $161.80 ($481.80 minus $320); and the family benefit

payable is $112 ($273.80 minus $161.80 equals $112). (The same result is obtained by subtracting the workmen's compensation amount ($208) from the applicable limit ($320).)

In this example, the $161.80 reduction would be applied first against the three section 202 benefits ($50.60 times 3 equals $151.80) leaving $10 to be deducted from the disability insurance benefit.

(h) *Effect of changes in family composition.* The addition or subtraction in the number of beneficiaries in a family may cause the family benefit to become, or cease to be, the applicable limit for reduction purposes under this section. When the family composition changes, the amount of the reduction is recomputed as though the new number of beneficiaries were entitled for the first month the reduction was imposed, i.e., the same average monthly wage, average current earnings, and workmen's compensation amount and the total benefits payable under title II of the Act for the new number of beneficiaries which would have been subjected to reduction for that first month are used. If the applicable limit both before and after the change is 80 percent of the average earnings, the amount payable remains the same and is simply redistributed among the beneficiaries entitled on the same earnings record.

Example: F is entitled to disability insurance benefits of $110.30 based on an average monthly wage of $289. His wife, G, and his child, H, are entitled to benefits under section 202 of the Act of $55.20 each. F becomes entitled to workmen's compensation of $192 a month. His average monthly wage for his 5 years of highest earnings after 1950 is $260.

The applicable limit on total benefits payable under title II of the Act and workmen's compensation is $231.20 (i.e., 80 percent of F's

average current earnings). The amount payable is figured as follows:

Total title II benefits	$220.70	$220.70
Monthly workmen's compensation	192.00	
Less 80 percent of F's average current earnings	412.70 231.20	
Reduction amount	181.50	181.50
Amount payable		39.20

(Deducting the workmen's compensation amount ($192) from 80 percent of the average current earnings ($231.20) gives the same amount payable ($39.20).)

Later, another child, J, becomes entitled on F's earnings record and the benefits after adjustment for the family maximum but before reduction for the workmen's compensation become $110.30 to F, and $40.90 to G, H, and J each. Since the total family benefit is now higher than 80 percent of F's average current earnings, the total family benefit becomes the applicable limit and the amount payable is figured merely by deducting the workmen's compensation ($192) from the total title II benefits ($233) leaving $41 payable to F.

(i) *Effect on benefit increases.* Any increase in benefits due to a recomputation or a statutory increase in benefit rates is not subject to the reduction for workmen's compensation and does not change the amount to be deducted from the family benefits. The increase is simply added to what amount if any is payable. If a new beneficiary becomes entitled to monthly benefits on the same earnings record after the increase, the amount of the reduction is redistributed among the new number of beneficiaries entitled under section 202 of the Act and deducted from their current benefit rate.

Example: K is entitled to disability insurance benefits of $118.80 and his wife, L, and his two children, M and N, are entitled to benefits under section 202 of the Act of $47.90 each (after reduction under section 203(a) to conform to the family maximum of $262.40). K becomes entitled to workmen's compensation of $30 per week ($130 per month). The total family benefit is higher by 10 cents than 80 percent of K's average current earnings (80 percent of $328, or $262.40). Therefore, the reduction amount equals the monthly workmen's compensation. One-third of this amount (rounded downward to the nearest 10 cents), i.e., $43.30, is deducted from L, M, and N's benefits leaving benefits payable as follows: $118.80 to K, and $4.60 each to L, M, and N.

Beginning in September 1966, a statutory increase raises K's disability insurance benefit to $122 and causes L, M, and N's benefits to be increased to $50.60 each (an increase of $2.70). The benefits then payable become: $122 to K, and $7.30 (i.e., $4.60 plus $2.70) each to L, M, and N.

In February 1967, O, another child of K, becomes entitled to benefits under section 202 of the Act based on K's earnings record. The benefits payable now become $122 to K, and $37.90 each to L, M, N, and O. The amount to be deducted from the family remains the same, $130, but is to be divided among four beneficiaries instead of three. Deducting one-fourth of $130 ($32.50) from $37.90 leaves $5.40 each to L, M, N, and O, and $122 to K.

(j) *Redetermination of benefits*—(1) *General.* In the second calendar year after the year in which reduction under this section in the total of an individual's benefits under section 223 of the Act and any benefits under section 202 of the Act based on his wages and self-employment income is first required (in a continuous period of months), and in each third

year thereafter, the amount of such benefits which are still subject to reduction under this section are redetermined, provided such redetermination does not result in any decrease in the total amount of benefits payable under title II of the Act on the basis of such individual's wages and self-employment income. Such redetermined benefit is effective with the January following the year in which the redetermination is made.

(2) *Average current earnings.* In making the redetermination required by subparagraph (1) of this paragraph, the individual's "average current earnings" (as defined in paragraph (c)(3) of this section) is deemed to be the product of his average current earnings as initially determined under paragraph (c)(3) of this section and the ratio of:

(i) The average of the taxable wages of all persons for whom taxable wages were reported to the Secretary for the first calendar quarter of the calendar year in which such redetermination is made, to

(ii) The average of the taxable wages of such persons reported to the Secretary for the first calendar quarter of the taxable year in which the reduction was first computed (but not counting any reduction made in benefits for a previous period of disability). Any amount determined under the preceding sentence which is not a multiple of $1 is reduced to the next lower multiple of $1.

(3) *Effect of redetermination.* Where the applicable limit on total benefits previously used was 80 percent of the average current earnings, a redetermination under this paragraph may cause an increase in the amount of benefits payable. Also, where the limit previously used was the total family benefit, the redetermination may cause the average current earnings to exceed the total family benefit and thus become the new applicable limit. If for some other

reason (such as a statutory increase or recomputation) the benefit has already been increased to a level which equals or exceeds the benefit resulting from a redetermination under this paragraph, no additional increase is made. A redetermination is designed to bring benefits into line with current wage levels when no other change in payments has done so.

Example: Beginning January 1968, P is entitled to a disability insurance benefit of $140 and his wife, R, and child, S, are entitled to benefits under section 202 of the Act of $70 each. P becomes entitled to workmen's compensation of $208 per month. In this case, the applicable limit on the combined benefits is $360 (80 percent of P's average current earnings). Deducting the workmen's compensation amount of $208 from this limit leaves family benefits payable of $152 ($140 to P and $6 to R and S each). In 1970 a redetermination raises 80 percent of P's average current earnings to $380 effective January 1971. Thus, the family benefit payable becomes $172 ($380 minus $208). P's benefit is $140, and R's and S's benefits are $16 each.

If there had been a benefit increase in 1969 (either by a statutory increase or a recomputation) increasing P's benefit by $10 (to $150) and each other benefit by $5 (to $11) the family would already be receiving $172 ($150 plus $11 plus $11 equals $172) at the time of redetermination, so that they would not get an additional increase. If the 1969 benefit increase made less than $172 payable to the family, the redetermination would increase the benefit to $172. Any statutory increase that takes effect after the redetermination would be added to the total family benefit.

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